

SECOND REGULAR SESSION

# HOUSE BILL NO. 1363

## 91ST GENERAL ASSEMBLY

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INTRODUCED BY REPRESENTATIVE SCHEVE.

Pre-filed January 3, 2002, and 1000 copies ordered printed.

TED WEDEL, Chief Clerk

2995L.011

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### AN ACT

To repeal sections 443.849, 443.851 and 443.853, RSMo, and to enact in lieu thereof two new sections relating to consumer protection of homeowners, with penalty provisions.

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*Be it enacted by the General Assembly of the state of Missouri, as follows:*

Section A. Sections 443.849, 443.851 and 443.853, RSMo, are repealed and two new sections enacted in lieu thereof, to be known as sections 407.1180 and 443.849, to read as follows:

**407.1180. 1. This section shall be known and may be cited as the "Unfair Home Improvement Loans Act".**

**2. For the purposes of this section, the following terms mean:**

**(1) "Consumer", an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes;**

**(2) "Goods", tangible chattel bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for such goods and including goods which, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property whether or not severable therefrom;**

**(3) "Home solicitation", any transaction made at the consumer's primary residence, except those transactions initiated by the consumer. A consumer response to an advertisement is not a home solicitation;**

**(4) "Person", an individual, partnership, corporation, limited liability company, association, or other group, however organized;**

**EXPLANATION — Matter enclosed in bold faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.**

16           (5) "Services", work, labor, and services for other than a commercial or business  
17 purpose and including services furnished in connection with the sale or repair of goods;

18           (6) "Transaction", an agreement between a consumer and any other person,  
19 whether or not the agreement is a contract enforceable by action, and includes the making  
20 of, and the performance pursuant to, such agreement.

21           3. The following unfair method of competition and unfair or deceptive act or  
22 practice undertaken by any person in a transaction intended to result or which results in  
23 the sale or lease of goods or services to any consumer is unlawful:

24           (1) The home solicitation of a consumer during which a loan is made encumbering  
25 the primary residence of such consumer for the purposes of paying for home improvements  
26 when:

27           (a) The extension of mortgage credit is secured by the consumer's dwelling without  
28 regard for the consumer's repayment ability;

29           (b) Payment is made under a home improvement contract from amounts extended  
30 as credit under a mortgage, except:

31           a. In the form of an instrument that is payable to the consumer or jointly to the  
32 consumer and the contractor; or

33           b. At the election of the consumer, by a third party escrow agent in the form of a  
34 written agreement signed by the consumer, creditor, and contractor before the date of  
35 payment; and

36           (c) The sale or assignment of certain mortgages is made without the provision of  
37 a notice stating that the mortgage is subject to any special laws, rules, or regulations  
38 provided by law.

39           4. A third party shall not be liable pursuant to this section, unless:

40           (1) There was an agency relationship between the party who engaged in the home  
41 solicitation and the third party; or

42           (2) The third party had actual knowledge of, or participated in, the unfair or  
43 deceptive transaction. A third party who is a holder in due course pursuant to a home  
44 solicitation transaction shall not be liable pursuant to this section.

45           5. Any person who violates the provisions of this section is guilty of a class D felony.  
46 In addition to any fines, penalties or sentences imposed by law, any person who is convicted  
47 of, or pleads guilty or nolo contendere to a violation of this section shall be required to  
48 make restitution.

49           6. The provisions of this section shall be applicable to transactions and contracts  
50 entered into on or after August 28, 2002.

443.849. A corporate surety bond in the principal sum of [twenty thousand] one

2 **hundred thousand** dollars shall accompany each application for a license. The bond shall be  
3 in a form satisfactory to the director and shall be issued by a bonding company or insurance  
4 company authorized to do business in this state, to secure the faithful performance of the  
5 obligations of the applicant and the agents and subagents of the applicant in connection with the  
6 activities of originating, servicing or acquiring mortgage loans, **including payment to providers**  
7 **of third-party services**. An applicant or licensee may, in lieu of filing the bond required  
8 pursuant to this section, provide the director with [a twenty thousand dollar] **an** irrevocable letter  
9 of credit, as defined in section 400.5-103, RSMo, issued by any financial institution.

2 [443.851. 1. At the end of the licensee's fiscal year, but in no case more than  
3 twelve months after the last audit conducted pursuant to this section and section  
4 443.853, each licensee shall cause the licensee's books and accounts to be audited by  
5 a certified public accountant not connected with such licensee. The books and  
6 records of all licensees shall be maintained on an accrual basis. The audit shall be  
7 sufficiently comprehensive in scope to permit the expression of an opinion on the  
8 financial statements in the report and must be performed in accordance with generally  
9 accepted accounting principles and generally accepted auditing standards.

2 2. As used in this section and section 443.853, the term "expression of  
3 opinion" includes either:

- 4 (1) An unqualified opinion;
- 5 (2) A qualified opinion;
- 6 (3) A disclaimer of opinion; or
- 7 (4) An adverse opinion.

8 3. If a qualified or adverse opinion is expressed or if an opinion is  
9 disclaimed, the reasons therefor shall be fully explained. An opinion, qualified as to  
10 a scope limitation, shall not be acceptable.

11 4. The audit report shall be filed with the director within one hundred twenty  
12 days of the audit date. The report filed with the director shall be certified by the  
13 certified public accountant conducting the audit. The director may promulgate rules  
14 regarding late audit reports.

15 5. As an alternative to the audit requirements of subsections 1 to 4 of this  
16 section, a licensee may meet the requirements of this section without filing an audit  
17 report by posting and maintaining a corporate surety bond, in addition to that  
18 described in section 443.849, in the amount of one hundred thousand dollars. The  
19 bond shall be in form specified by and satisfactory to the director and payable to the  
20 director and shall be issued by a bonding company or insurance company authorized  
21 to do business in this state, to secure the faithful performance of the obligations of  
22 the licensee, its agents and subagents in connection with the activities of originating,  
23 servicing or acquiring mortgage loans. A licensee may, in lieu of this bond, provide  
24 the director with a one hundred thousand dollar irrevocable letter of credit, as defined  
25 in section 400.5- 103, RSMo, issued by any financial institution.]

26 [443.853. 1. If any licensee required to make an audit fails to cause an audit  
27 to be made, the director shall cause the audit to be made by a certified public  
28

3 accountant at the licensee's expense. The director shall select such certified public  
4 accountant by advertising for bids or by such other fair and impartial means as the  
5 director establishes by regulation.

6 2. In lieu of an audit required by this section and section 443.851, the director  
7 may accept any audit made in conformance with the audit requirements of the United  
8 States Department of Housing and Urban Development.

9 3. The workpapers of the certified public accountants employed by each  
10 licensee for purposes of conducting audits required by this section and section  
11 443.851 are to be made available to the director or the director's designee upon  
12 request and may be reproduced by the director or the director's designee to enable the  
13 director to carry out the purposes of sections 443.800 to 443.893.]